

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: November 1, 2005 DEPT. 71

REPORTER:

**HON. RONALD S. PRAGER,
JUDGE PRESIDING**

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BAILIFF:

**Judicial Council
Coordination Proceedings
No. JCCP 4041**

**Coordination Proceeding
Title [Rule 1550(b)]
TOBACCO CASE**

TENTATIVE RULING:

The parties agree that section XVIII(b)(2) of the Master Settlement Agreement ("MSA") does not support Bekenton's "most favored nations" ("MFN") claim because it affords MFN rights only to Original Participating Manufacturers ("OPMs"). Therefore, the only potentially applicable MFN clause is the one contained in section XVIII(b)(4) of the MSA.

The first issue to be determined is whether General Tobacco ("General") and/or Farmers Tobacco Company ("Farmers") were "Participating Manufacturers" ("PMs") at the time they entered into their respective Agreements (the General Tobacco Forbearance Agreement, Amendment No. 24 to MSA, and the Farmers Agreement) with the Settling States. If they were not PMs at that time, Bekenton has no MFN rights under section XVIII(b)(4) of the MSA with respect to those Agreements. If they were PMs at that time, Bekenton does have MFN rights, and the Court must proceed to the next issue, which is whether the General, Farmers, or Premier Manufacturing, Inc. ("Premier") Agreements "relieved" General, Farmers, or Premier of any MSA payment obligation.

The General and Farmers Agreements are deals between the Settling States and tobacco product manufacturers that are not parties to the MSA ("Non-Participating Manufacturers" or "NPMs") in anticipation of those manufacturers joining the MSA. The MSA requires that an NPM such as General or Farmers that wishes to join the MSA after the MSA's Execution Date must make any payments (referred to as "back payments") it would have had to make had it been a party to the MSA since the MSA's Execution Date. (See MSA § II(jj).) These back payment

obligations must be addressed *before* the NPM is allowed to gain permanent membership in the MSA. Therefore, the Settling States enter into contracts with NPMs, such as those entered into with General and Farmers, which set forth the back payment terms, *before* those NPMs join the MSA.

The General and Farmers Agreements were thus conditions to General and Farmers joining the MSA, i.e., the execution of these Agreements was a condition precedent to General's and Farmers' joinder into the MSA. Therefore, it cannot be said that either General or Farmers was a PM at the time the General or Farmers Agreements were executed. Language contained in the General Agreement supports this finding. (See General Agreement, p.3, 1st recital, emphasis added [*"General Tobacco wishes to become a Subsequent Participating Manufacturer under the [MSA] . . ."*]; see also General Agreement, p. 3, ¶ 2(c), emphasis added [*"By prior agreement, Protobacco has authorized the release of all Escrowed Funds . . . upon General Tobacco's entry into the MSA."*].)

Language contained in the MSA Amendment also indicates that General was not a PM at the time it executed that Agreement. (See MSA Amendment, pp. 2-3, ¶¶ B(1), (2), and (3), emphasis added [*"General Tobacco shall be considered to be a Tobacco Product Manufacturer and a Participating Manufacturer . . . , provided that . . . [on or before August 19, 2004, General executes the MSA, Adherence Agreement, and Exclusive Manufacturing and Distribution Agreement.];* see also MSA Amendment, p. 8, ¶ E, emphasis added [*"Neither General Tobacco, nor any Affiliate of General Tobacco, . . . , shall, after the date General Tobacco becomes a signatory to the MSA, import, sell or distribute Cigarettes manufactured . . . by a Non-Participating Manufacturer."*].)

The Farmers Agreement similarly includes a provision which implies that Farmers was not a PM at the time it executed the Farmers Agreement. (See Farmers Agreement, p. 1, 4th recital, emphasis added [*"Farmers wishes to become a Subsequent Participating Manufacturer under the [MSA] . . ."*].)

Accordingly, the Court finds that General and Farmers were not "Participating Manufacturers," as that term is used in the MSA's section XVIII(b)(4) MFN clause, at the time they entered into the General Agreement, the MSA Amendment, and the Farmers Agreement. Therefore, Bekenton has no MFN rights under section XVIII(b)(4) of the MSA with respect to those Agreements.

Assuming arguendo that General and Farmers *were* PMs at the time they executed the General and Farmers Agreements, the next issue to be addressed would be whether the General or Farmers Agreements (in addition to the Premier Agreement) "relieved," as the term is used in MSA section XVIII(b)(4), General or Farmers (or Premier) of any MSA payment obligation. Considering the context, the

surrounding language, and the legal definition of the term “relieve,” the Court finds that, as used in section XVIII(b)(4) of the MSA, “relieve” means “to set free from a duty, burden, or liability.” Thus, if General, Farmers, or Premier were freed from having to make a payment obligation under the MSA, Bekenton would have MFN rights with respect to the relevant agreements under section XVIII(b)(4) of the MSA.

From the date they joined the MSA, General, Farmers, and Premier have been responsible for making annual MSA payments amounting to approximately \$4.00 per carton of cigarettes, which is the same amount that Bekenton and other PMs have been responsible for making. In addition, General, Farmers, and Premier (unlike Bekenton) have been required to make back payments for every cigarette they sold between the MSA Execution date and the date they joined the MSA.

The Court finds that nothing in the General, Farmers, or Premier Agreements “relieved” these tobacco manufacturers of any MSA payment obligation. Bekenton has offered no evidence or argument to indicate that General’s obligation to repay, over a 12-year period, a \$243 million back payment obligation relieves General of a payment obligation. Nor does Bekenton present evidence that 12 years is an unreasonable period of time over which to require payment. Similarly, Bekenton has presented no argument or evidence to suggest that the 10-year payback period provided in the Farmers Agreement either relieves Farmers of a payment obligation or sets an unreasonable period of time over which to require payment, especially considering that Farmers’ back payment totaled approximately \$18 million.

With respect to the Premier Agreement, Bekenton does not state a term contained therein which relieves Premier of a payment obligation of the MSA. In fact, the Premier Agreement obligates Premier to make the same payments as other SPMs, in addition to obligating Premier to provide personal guarantees, security interests, access to its tax and U.S. customs information, and a higher interest rate on MSA payments for cigarette sales made from 1999-2001.

Because none of the General, Farmers, or Premier Agreements relieved those tobacco manufacturers of any payment obligations under the MSA, Bekenton’s MFN rights under section XVIII(b)(4) were not triggered with respect to these Agreements.

In summary, this Court finds that Bekenton had no MFN rights arising from any of the Agreements at issue, and more specifically: (1) General and Farmers were not “Participating Manufacturers” at the time they entered into the General Agreements and the Farmers Agreement; and (2) the General, Farmers, and

Premier Agreements do not “relieve” them of any MSA payment obligations. Thus, Bekenton’s claim fails.

Bekenton’s Motion to File under Seal Exhibits A through D to Dennis Bruce’s Declaration (filed in support of Bekenton’s Memorandum and Bekenton’s Reply) is granted. It appears these documents were retrieved from the Independent Auditor’s extranet site, which may be accessed by PMs, the Settling States, and the NAAG through the use of a password. Pursuant to the MSA, these documents, which reveal the Auditor’s calculations with respect to payments owed by General for its cigarette sales, should remain under seal. (See MSA § XI(a) [“The [PMs] and the Settling States agree to maintain the confidentiality of [information relating to calculation of a PM’s payments].”].)